



July 30, 2001

Ms. Daisy A. Stiner  
Executive Director  
Texas Department of Housing and Community Affairs  
P.O. Box 13941  
Austin, Texas 78711-3941

OR2001-3287

Dear Ms. Stiner:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 151309.

The Texas Department of Housing and Community Affairs (the "department") received two requests for full copies of the applications submitted for the 2001 Low Income Housing Tax Credit Program. You claim that the requested information is excepted from disclosure under sections 552.101, 552.104, and 552.110 of the Government Code. In addition, because you believe the request may involve the proprietary or property interests of those who submitted applications for tax credits, you notified those entities of the request by a letter dated June 21, 2001, in compliance with section 552.305 of the Government Code.<sup>1</sup> To date, we have received responses from numerous entities representing various applicants for low income housing tax credits. We have considered the exceptions you claim as well as the arguments submitted by the third parties, and have reviewed the submitted representative sample of information.<sup>2</sup>

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<sup>1</sup>See Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); Open Records Decision No. 542 (1990) (determining that statutory predecessor to Gov't Code § 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in Public Information Act in certain circumstances).

<sup>2</sup>We assume that the "representative samples" of records submitted to this office are truly representative of the requested records as a whole. See Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other

Initially, we note that section 552.022 of the Government Code makes certain information expressly public, and therefore not subject to discretionary exceptions to disclosure. Section 552.022 states in relevant part:

(a) Without limiting the amount or kind of information that is public information under this chapter, the following categories of information are public information and are not excepted from required disclosure under this chapter unless they are expressly confidential under other law.

Gov't Code § 552.022. One such category of expressly public information under section 552.022 is "information regarded as open under an agency's policies . . . ." Gov't Code § 552.022(a)(15). Although the department failed to inform this office of the department's own policy, the requestor in this case notified this office that the department has adopted rules at 10 T.A.C. § 50.4, effective February 18, 2001, that read as follows:

(c) Availability of Application. Applications for tax credits are public information and are available upon request after the Application Acceptance Period closes. Exhibits to an Application will not be available for public disclosure until after the Board approves the Allocation of tax credits, in accordance with the Texas Public Information Act of the Government Code Chapter 552.

(d) Confidential Information. An Applicant shall mark each Exhibit or a portion thereof that the Applicant considers confidential as to trade secrets or commercial or financial information, in which the Applicant desires not to be disclosed in accordance with Texas Public Information Act. A request for such information shall be processed in accordance with 552.305 of the Government Code.

10 T.A.C. § 50.4(c), (d). Therefore, as the department has adopted a policy making the application form for low income housing tax credits, but not the attached exhibits, public after close of the application acceptance period, which you inform us was no later than May 15, 2001,<sup>3</sup> the requested applications are currently regarded as open according to the department's policies, and must be released to the requestor under section 552.022(a)(15) unless they are confidential under other law.

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requested records to the extent that those records contain substantially different types of information than that submitted to this office.

<sup>3</sup>See Gov't Code § 2306.671(d), providing for May 15 deadline for submission of application for low income housing tax credit.

You argue that the applications and attached exhibits are excepted from disclosure under section 552.104. Section 552.104 is a discretionary exception and not "other law" for purposes of section 552.022.<sup>4</sup> Therefore, the application form may not be withheld under section 552.104. However, as the department made the availability of the attached exhibits subject to the Public Information Act, we find that such exhibits are not made expressly public under section 552.022(a)(15). Therefore, we will address your section 552.104 argument for the attached exhibits.

Section 552.104 excepts from disclosure "information that, if released, would give advantage to a competitor or bidder." The purpose of this exception is to protect a governmental body's interests in competitive bidding situations. *See* Open Records Decision No. 592 (1991). Governmental bodies may withhold bid information under section 552.104 while governmental officials are in the process of evaluating the proposals and asking competitors to clarify their bids. Open Records Decision No. 170 (1977). Section 552.104 requires a showing of some actual or specific harm in a particular competitive situation; a general allegation that a competitor will gain an unfair advantage will not suffice. Open Records Decision No. 541 (1990). Section 552.104 does not except information relating to competitive bidding situations once a contract has been awarded. Open Records Decision Nos. 306 (1982), 184 (1978).

You explain that the application process for tax credits is competitive at this time. You state that

release of any part of the low income housing tax credit application during this competitive period would put a competitor for tax credits at an advantage over others . . . . This would interfere with the Department's assurance of a fair and equal review process of the applications and would potentially harm the Department's interest in competitively awarding tax credits.

Based upon these representations, we conclude that section 552.104 is applicable to the exhibits attached to the applications for low income housing tax credits. The department may withhold these exhibits from disclosure under section 552.104 until it awards the tax credits.

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<sup>4</sup>Discretionary exceptions are intended to protect only the interests of the governmental body, as distinct from exceptions which are intended to protect information deemed confidential by law or the interests of third parties. *See, e.g.*, Open Records Decision Nos. 630 at 4 (1994) (governmental body may waive attorney-client privilege, section 552.107(1)), 592 at 8 (1991) (governmental body may waive section 552.104, information relating to competition or bidding), 522 at 4 (1989) (discretionary exceptions in general). Discretionary exceptions therefore do not constitute "other law" that makes information confidential.

We will next address your arguments under section 552.101, as well as the arguments submitted by the third parties under sections 552.101 and 552.110, for the information contained in the application form.<sup>5</sup>

Section 552.101 excepts "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." The department, as well as numerous third parties, argue that the requested applications are confidential under sections 2306.676 and 2306.678 of the Government Code. Section 2306.676 provides:

[t]he department shall establish procedures through the qualified allocation plan to ensure that each applicant for a low income housing tax credit has a fair and equal opportunity to submit or resubmit an application and submit for consideration any authorized supplementary materials and information.

Section 2306.678 provides:

(a) The department shall provide information regarding the low income housing tax credit program, including notices of public hearings, meetings, and opening and closing dates for applications for a low income housing tax credit, to local housing departments, newspapers, nonprofit organizations, on-site property managers of occupied projects that are the subject of tax credit applications for posting in prominent locations at those projects, and other interested persons and community groups, who request the information.

(b) The department shall hold at least three public hearings in different regions of the state to receive public comments on low income housing tax credit applications.

With regard to section 2306.676, the department argues that release of application materials during the period that department staff reviews applications, scores, and underwrites the project for feasibility as required by federal law, would be inequitable to applicants. First, the department's assertion is belied by the department's own drafting and adoption of section 50.4 (c) of the Texas Administrative Code, permitting disclosure of the applications during the review process. Moreover, concerning section 2306.678, the department states that "[a]lthough not specifically excluded, an application is not included as information to be provided as public information." We note, however, that in order to fall under section 552.101 of the Government Code, a statute must explicitly state that information is confidential or require that information not be released to the public. *See Open Records Decision Nos. 658 at 4 (1998), 478 at 2 (1987), 465 at 4-5 (1987).* We will not imply a confidentiality requirement from the structure of a statute. *See ORD 465 at 4-5.* Therefore,

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<sup>5</sup>Sections 552.101 and 552.110 are considered "other law" for purposes of section 552.022.

as neither section 2306.676 or 2306.678 of the Government Code explicitly makes the application forms confidential, we find that the requested application forms may not be withheld under these sections.

Section 552.101 also encompasses the doctrines of common law and constitutional privacy. Common law privacy protects information if (1) the information contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). This office has found that personal financial information not relating to the financial transaction between an individual and a governmental body is protected by common law privacy, *see* Open Records Decision Nos. 600 (1992), 545 (1990). However, there is a legitimate public interest in the essential facts about a financial transaction between an individual and a governmental body. *Id.* Upon review of the application form, we do not believe that it contains any information protected by common law privacy. *Cf.* Open Records Decision No. 620 (1993) (corporation has no common law privacy interest in its financial information).

Next, we note that one of the third parties has raised section 552.105 of the Government Code to protect certain application information. Section 552.105 excepts from disclosure information relating to:

- (1) the location of real or personal property for a public purpose prior to public announcement of the project; or
- (2) appraisals or purchase price of real or personal property for a public purpose prior to the formal award of contracts for the property.

Section 552.105 was designed to protect a governmental body's planning and negotiating position with respect to particular transactions. Open Records Decision No. 564 at 2 (1990). As the department does not raise section 552.105, this section is not applicable to the requested information. Therefore, the requested information may not be withheld under section 552.105.

We will next address the arguments of the third parties under section 552.110. Section 552.110 protects the property interests of private persons by excepting from disclosure two types of information: (1) trade secrets obtained from a person and privileged or confidential by statute or judicial decision and (2) commercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the information was obtained.

The Texas Supreme Court has adopted the definition of trade secret from section 757 of the Restatement of Torts. *Hyde Corp. v. Huffines*, 314 S.W.2d 763 (Tex.), *cert. denied*, 358

U.S. 898 (1958); *see also* Open Records Decision No. 552 at 2 (1990). Section 757 provides that a trade secret is

any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. It differs from other secret information in a business . . . in that it is not simply information as to single or ephemeral events in the conduct of the business . . . . A trade secret is a process or device for continuous use in the operation of the business. . . . [It may] relate to the sale of goods or to other operations in the business, such as a code for determining discounts, rebates or other concessions in a price list or catalogue, or a list of specialized customers, or a method of bookkeeping or other office management.

RESTATEMENT OF TORTS § 757 cmt. b (1939). In determining whether particular information constitutes a trade secret, this office considers the Restatement's definition of trade secret as well as the Restatement's list of six trade secret factors. RESTATEMENT OF TORTS § 757 cmt. b (1939).<sup>6</sup> This office has held that if a governmental body takes no position with regard to the application of the trade secret branch of section 552.110 to requested information, we must accept a private person's claim for exception as valid under that branch if that person establishes a *prima facie* case for exception and no argument is submitted that rebuts the claim as a matter of law. Open Records Decision No. 552 at 5-6 (1990). The governmental body, or interested third party, raising section 552.110(b) must provide a specific factual or evidentiary showing, not conclusory or generalized allegations, that substantial competitive injury would likely result from disclosure. Gov't Code § 552.110(b); *see also National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974). The department did not take a position with regard to the applicability of section 552.110.

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"The six factors that the Restatement gives as indicia of whether information constitutes a trade secret are:

(1) the extent to which the information is known outside of [the company]; (2) the extent to which it is known by employees and others involved in [the company's] business; (3) the extent of measures taken by [the company] to guard the secrecy of the information; (4) the value of the information to [the company] and [its] competitors; (5) the amount of effort or money expended by [the company] in developing the information; (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

RESTATEMENT OF TORTS § 757 cmt. b (1939); *see also* Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).

Of the briefs received, the following entities made arguments under section 552.110 and/or section 552.305<sup>7</sup> for information contained in the application form: Borger Fountainhead, L.P.; Henderson Fountainhead, L.P.; Forney Fountainhead, L.P.; Community Retirement Centre, Inc.; Village at Meadowbend; River Glen; Skyway Villas Apartments; Blunn Creek Apartments; Fulton Village Apartments, L.P.; Deen-Forth Worth Associates, L.P.; Western Iris, LTD; Western Whirlwind, LTD; Cactus Rose, LTD.; Arrowhead Place, LTD; Western Sunshine Pass, LTD; Bienvivir Parkside Senior Community; Sunrise Mountain, LTD; Laredo Viejo Apartment Homes; Clark's Crossing Apartments; Las Villas De Merida Apartments, L.P.; Stonegate Housing, LTD; Science Park Seniors; O'Connor Road Seniors; Bachon Townhomes, L.P.; Outspan Townhomes, L.L.P.; Live Oak Townhomes, L.P.; SDC Investments, LTD; Laredo Vista, L.P.; Villas Laredo, L.P.; Cedar Hills Housing, L.P.; TX Timbercreek Housing, L.P.; Balboa Housing, L.P.; Tahoe Housing, L.P.; Highland Gardens, L.P.; Escondido Housing, L.P.; Housing Associates of Del Rio, LTD; Housing Associates of Brownsville, LTD; Housing Associates of Harlingen, LTD; LaPorte Venture, LTD; TownePark Fredricksburg Housing Partners, LTD; The Greens on TurtleCreek, LTD; H-K Housing Partners, LTD; Bexar Creek, LTD; Fort Bend Group, LTD; Dusty Trails Partners, L.P.; Lakeshore Partners, L.P.; Cricket Hollow Partners, L.P.; Graugnard Place, LTD; Bayou Pointe, LTD; MSE Engineers, Inc.; and Life Rebuilders, Inc. The remainder of the entities submitting arguments to this office, and any other applicants who submitted applications to the department, did not raise section 552.110 for the applications, and therefore, we have no basis upon which to find their applications confidential under section 552.110.

Upon review of the arguments submitted by the third parties, we note that some made section 552.110 arguments only for the exhibits, and not for the applications. As section 552.104 is dispositive for the information in the exhibits, we need not address these arguments. For those who made section 552.110 arguments for the information in the applications, we find that Bachon Townhomes, L.P., Outspan Townhomes, L.L.P., Live Oak Townhomes, L.P., SDC Investments, LTD, Laredo Vista, L.P., Villas Laredo, L.P., Cedar Hills Housing, L.P., TX Timbercreek Housing, L.P., Balboa Housing, L.P., Tahoe Housing, L.P., Highland Gardens, L.P., and Escondido Housing, L.P. have shown how release of the information in section 11, paragraph A of section 13, sections 14-15 and sections 17-18 of the application form would cause them substantial competitive harm. Therefore, the information in these sections must be withheld from the applications of these entities under section 552.110(b). Life Rebuilders, Inc. has demonstrated how release of the information in sections 5, 11, 12, 13 and 17 of the application form would cause it substantial competitive harm, and therefore, the information in these sections must be withheld from the application of Life Rebuilders, Inc. under section 552.110(b). In addition, if information contained in these sections is found elsewhere in the application of Life Rebuilders, Inc., this information

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<sup>7</sup>Section 552.305(a) of the Government Code provides that "[i]n a case in which information is requested under this chapter and a person's privacy or property interests may be involved, including a case under Section 552.101, 552.104, 552.110, or 552.114, a governmental body may decline to release the information for the purpose of requesting an attorney general decision."

must be withheld from such other sections. Borger Fountainhead, L.P., Henderson Fountainhead, L.P., and Forney Fountainhead, L.P., have demonstrated how release of the information in sections 11, 12, 17 and 19 of the application form would cause them substantial competitive harm, and therefore, the information in these sections must be withheld from the application of Borger Fountainhead, L.P., Henderson Fountainhead, L.P., and Forney Fountainhead, L.P. under section 552.110(b). If information contained in these sections is found elsewhere in the application of these three entities, this information must be withheld from such other sections. We find that no other company has demonstrated that the information contained in its application form is excepted under section 552.110.

We next note that several entities have raised section 552.131 of the Government Code. Section 552.131 excepts from public disclosure a business prospect's trade secret or commercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm if the information relates to economic development negotiations involving a governmental body and a business prospect that the governmental body seeks to have locate, stay, or expand in or near the governmental body's territory. Gov't Code § 552.131(a). As we find that none of the information submitted by the applicants for low income tax credits was submitted for purposes of economic development negotiations under section 552.131, we find that none of the information at issue is excepted under this section.

Finally, we note that section 19 of the application form contains a social security number. Social security numbers may be withheld in some circumstances under section 552.101 of the Government Code. A social security number or "related record" may be excepted from disclosure under section 552.101 in conjunction with the 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I). *See* Open Records Decision No. 622 (1994). These amendments make confidential social security numbers and related records that are obtained and maintained by a state agency or political subdivision of the state pursuant to any provision of law enacted on or after October 1, 1990. *See id.* We have no basis for concluding that any of the social security numbers in the file are confidential under section 405(c)(2)(C)(viii)(I), and therefore excepted from public disclosure under section 552.101 on the basis of that federal provision. We caution, however, that section 552.352 of the Public Information Act imposes criminal penalties for the release of confidential information. Prior to releasing any social security number information, you should ensure that no such information was obtained or is maintained by the department pursuant to any provision of law, enacted on or after October 1, 1990.

To summarize, the exhibits to the application forms submitted to the department for low income housing tax credits may be withheld in their entirety under section 552.104 until the award of the tax credits. The application forms themselves are expressly public under section 552.022(a)(15) and therefore may not be withheld under section 552.104. Portions of the application form may be withheld under section 552.110(b) as set forth above. Social security numbers must be withheld under section 552.101 if they were obtained or are



maintained by the department pursuant to any provision of law enacted on or after October 1, 1990. The remainder of the application forms must be released to the requestors.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the General Services Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for

contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Michael A. Pearle  
Assistant Attorney General  
Open Records Division

MAP/seg

Ref: ID# 151309

Enc. Submitted documents

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